Supreme Court, U.S.
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No. ____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1994

JOSEPH B. SHUMATE, JR.,
Petitioner

v.

NCNB CORPORATION AND ITS SUBSIDIARIES, now NationsBank

and

ROY V. CREASY, Trustee,

and

COLEMAN FURNITURE CORPORATION; and COLEMAN FURNITURE CORPORATION PENSION PLAN
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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10 pp

QUESTIONS PRESENTED

The Employment Retirement Income Security Act (E.R.I.S.A.) 29 U.S.C. §1056(d)(1) requires all qualified retirement plans to contain an anti-alienation provision required under the Internal Revenue Code 26 U.S.C. §401(a)(13). A qualified plan not only must reflect the anti-alienation language of E.R.I.S.A. itself, but must unequivocally prohibit any access to plan funds by creditors of participants.

E.R.I.S.A. provides that the termination of a single employer plan that is fully funded can not be completed until the plan administrator purchases irrevocable commitments from an insurer to provide all the benefit liabilities under the plan pursuant to 29 U.S.C. §1341(b)(3)(i).

Public policy as defined by the

Congress of the United States and upheld by this court is that if a worker has been promised a defined pension benefit upon retirement, and if he has fulfilled what conditions are required to obtain a vested benefit, he will actually receive it.

The petitioner was a participant in a qualified retirement plan containing the anti-alienation provision required by E.R.I.S.A. and the I.R.S. The plan was terminated by court order. The petitioner's benefits were placed in the district court's registry pending determination whether the funds belonged to the petitioner or his bankruptcy estate. During the nine year period to litigate the ownership of the petitioner's pension, the respondent obtained a sizeable judgment against the petitioner as he was denied standing and

other statutory and constitutional rights to defend against respondent's claim. The petitioner's future pension benefits were placed into a trust account pending purchase of a irrevocable annuity from an insurer. The respondent filed a lien and a garnishment action against the trust account pursuant to Virginia Code §8.01-501, 502.

The questions presented are:

1. When does the anti-alienation provision of an E.R.I.S.A./I.R.S. approved pension plan cease to protect these funds?
2. When does a fully funded single employer E.R.I.S.A./I.R.S. approved pension plan become terminated?
3. Are the lower courts ruling that Shumate's future pension payments can not be placed into an insured annuity for future pension payments

contrary to the intent and policy of Congress?

LIST OF PARTIES

The parties are the petitioner Joseph B. Shumate, Jr. and Coleman Furniture Corporation and Coleman Furniture Corporation Pension Plan and the respondent is NationsBank of North Carolina, successor to NCNB National Bank of North Carolina; NCNB National Bank, successor to NCNB Financial Services, Inc.

Roy V. Creasy as trustee of Coleman and the Coleman pension plan administrator and John R. Patterson did not participate in this action as to the turnover of Shumate's pension funds from the district court's registry in the district court or in the court of appeals, and therefore, they are not

named as parties herein.

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The Fourth Circuit unpublished per curiam opinion which is not a binding precedent in the Fourth Circuit affirming the district court's ruling that E.R.I.S.A./I.R.S. approved pension funds were no longer protected from attachment, garnishment or levy under the Employment Retirement Income Security Act's anti-alienation provision codified in 29 U.S.C. §1056(d)(1) prior to the fully funded Coleman pension plan being terminated pursuant to Title IV of E.R.I.S.A. 29 U.S.C. §1301 et. seq. and specifically §1341(b)(3)(i) is in direct conflict with published opinions of the Fourth Circuit, of other

circuits, and the Supreme Court. It also denies the petitioner his equal protection of the above laws as guaranteed by the 5th and 14th Amendments of the Constitution of the United States and is contrary to public policy.

The crucial point in this case is whether or not the petitioner be allowed to purchase a irrevocable annuity from an insurer to provide him with his future monthly pension benefits pursuant to 29 U.S.C. §1341 as the district court relieved Roy Creasy, plan administrator of the Coleman pension plan, of his fiduciary duties as prescribed 29 U.S.C. §1104 by allowing the plan administrator to dump Shumate's pension funds in the district court's registry rather than purchasing a irrevocable annuity from an insurer to provide Shumate his future benefits under the pension plan pursuant to §1341(b)(3)(i).

1. When does the anti-alienation provision of an E.R.I.S.A./I.R.S. pension plan cease to protect these funds?

2. When does a fully funded single employer E.R.I.S.A./I.R.S. approved pension plan become terminated?

3. Are the lower courts ruling that Shumate's future pension payments can not be placed into an insured annuity for future pension payments contrary to the intent and policy of Congress?

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1994

NATIONSBANK OF NORTH CAROLINA, N.A., successor to NCNB National Bank of North Carolina; NCNB National Bank, successor to NCNB Financial Services, Inc.
Plaintiff-Appellee

and

ROY V. CREASY, Trustee,
Plaintiff

v.

JOSEPH B. SHUMATE, JR.,
Defendant-Appellant

and

COLEMAN FURNITURE CORPORATION; COLEMAN FURNITURE CORPORATION PENSION PLAN
Defendants

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

The petitioner, Joseph B. Shumate, Jr., respectfully prays that a writ of certiorari issued to review the judgment and opinion of the United States Court of

Appeals for the Fourth Circuit decided in the above entitled proceeding on December 29, 1994, petition for rehearing denied on February 6, 1995.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit is reprinted in the Appendix hereto p. 1a, infra.

The order of the Court of Appeals for the Fourth Circuit denying the petition for rehearing is reprinted in the Appendix hereto p. 5a, infra.

The decision and opinion of the United States District Court for the Western District of Virginia is reprinted in the Appendix hereto p. 7a, infra.

The District Court order denying motion to alter or amend dated July 15, 1993, is reprinted in the Appendix hereto p. 20a, infra.

JURISDICTION

The jurisdiction of this court to review the judgment of the Fourth Circuit Court of Appeals is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

26 U.S.C. § 401(A)(13)(A)

29 U.S.C. § 1056(d)(1)

29 U.S.C. § 1341(b)(3)(i)

STATEMENT OF THE CASE

Shumate is a former employee of Coleman Furniture Corporation (Coleman). Coleman had an E.R.I.S.A./I.R.S. approved pension plan of which Shumate was a participant in the plan.

Article 16.1 of the plan contained the anti-alienation provision required for qualification under 29 U.S.C. §1056(d)(1) and 26 U.S.C. §401(A)(13)(A).

Coleman filed for bankruptcy under Chapter 11 on November 3, 1982. The district court appointed an operating trustee for Coleman in February 1983. Shumate was terminated from Coleman in February 1983, having over 31 years of continuous employment with Coleman. Article 5.3 of the Coleman pension plan allowed a participant who had completed at least 30 years benefit accrual service to take early retirement. Shumate

elected to receive a monthly benefit beginning March 1, 1983, on a life-only basis. (App. p. 22a, infra) Shumate was paid his pension by the Coleman pension trust trustee, Wachovia Bank and Trust Company for March, April and May 1983. (App. p. 23a, infra)

Coleman was converted to a Chapter 7 in June 1983. The district Court appointed Roy V. Creasy as Coleman's Chapter 7 trustee. Mr. Creasy would not allow the pension plan administrator and the pension committee to administer the Coleman plan voiding all actions the pension committee had done since Coleman filed for bankruptcy in November 1982 including Shumate's monthly pension payment and preventing over four hundred of Coleman employees from receiving their pension when they were terminated in May 1983 from Coleman.

Creasy won the right to control the Coleman pension plan when the Fourth Circuit affirmed the district court in Creasy v. Coleman, 763 f.2d 656 (4 CCA 1985). Creasy immediately discharged the Coleman pension committee, the pension plan trustee, Wachovia Bank and Trust Company, terminating the plan and amending the plan back to December 1, 1984.

Shumate was forced into personal bankruptcy under Chapter 11 of the Bankruptcy Code on June 1, 1984 being dismissed from bankruptcy on June 26, 1984 and reinstated into bankruptcy under Chapter 7 on August 24, 1984. On respondent's motion Shumate was denied a discharge for supposedly secreting some of his assets in his bankruptcy case.

NationsBank also pushed to have Shumate convicted of bankruptcy crimes.

Shumate was tried and not convicted of any bankruptcy crimes or any other felony or crimes of moral turpitude. The issue of discharge of debt is still being contested in the lower courts.

Mr. Creasy, the court appointed Coleman bankruptcy trustee and plan administrator of the Coleman pension plan, paid essentially all participants in the Coleman plan their respective pension in July 1987 except Shumate. The district court ordered the Coleman plan administrator to pay the funds earmarked for Shumate's pension into the district court's registry pending decision as to who would get the funds and how they would be paid out. (App. p. 40a, infra) NationsBank had no judgment against Shumate until 1990 when the district court held that Shumate had no standing to defend NationsBank's claim against

him.

NationsBank prevailed upon Shumate's bankruptcy trustee to file a motion for turnover of Shumate's pension to his bankruptcy estate of which NationsBank would have received most of it if their claim against his estate was approved.

Shumate filed for turnover of his rightful pension to him in Civil Action #86-272. The district court denied Shumate's request and ordered his pension funds to be paid over to his bankruptcy trustee. The Fourth Circuit reversed the district court in #88-2174 on August 12, 1991. This court affirmed the Fourth Circuit in Patterson v. Shumate on June 15, 1992, 112 S.Ct. 2242 (1992).

In May 1992 the bank filed a motion for payment of the fund pursuant to 28 U.S.C. §2042, obtained a writ of execution and filed a suggestion for

summons in garnishment. A garnishment summons was issued by the clerk of the U.S. district court and served upon Shumate and the clerk of the U. S. District Court.

In June 1992 Shumate filed a petition for payment of the funds to him and filed motion to deny NationsBank's petition for payment of the funds to it and to quash the bank's writ of execution and garnishment. The district court in October/November 1982 held that the fund as held by the court was exempt from the bank's garnishment under E.R.I.S.A. because the payment of the fund into the court's registry as agreed to by Shumate did not constitute an actual receipt of the funds by Shumate. The court granted Shumate's motion for payment of the fund and quashed the bank's garnishment. The court declined to decide the issue of

whether the funds would be subject to garnishment immediately upon release from the court's registry on the ground the issue was not right for decision. The bank appealed the decision to the Fourth Circuit. In an unpublished opinion the Fourth Circuit affirmed the decision of the district court that the funds were exempt from garnishment because there had been no actual receipt of the funds by Shumate. This court also affirmed the district court's refusal to decide whether the fund would be subject to garnishment immediately upon release from the court registry to Shumate. NCNB v. Shumate, slip op. #92-2474 (4 CCA May 18, 1993). (App. p. 24a, infra)

On June 1, 1993, Shumate filed a motion for the withdrawal of the funds from the district court's registry and to enjoin NationsBank from taking any

further action against these funds while protected by E.R.I.S.A. The district court ordered the funds released to Shumate on June 10, 1993, but refused to enjoin NationsBank from taking further action against the funds while protected by E.R.I.S.A. Shumate received the funds on June 11, 1993, distributing his pension payments due him from June 1, 1983 through June 1, 1993 and placed the balance in a trust account in a local bank (Premier Bank) (App. p. 29a, infra) pending shopping for the best paying annuity to provide Shumate his monthly pension on a life-only basis being the way he elected to take his pension in 1983 and his settlement agreement with the trustee of Coleman in 1987 (App. p. 32a, infra) pursuant to 29 U.S.C. §1341(b)(3)(i).

NationsBank filed a lien pursuant to

Virginia Code §8.01-502 on June 15, 1993, Premier Bank receiving same on June 16, 1993.

The district court held a evidentiary hearing on June 25, 1993, to hear Shumate's motion to quash the lien pending placing the funds in an annuity as required before a pension plan can be closed out.

The district court on June 29. 1993 denied Shumate's motion to quash NationsBank's lien on the funds held in trust in Premier Bank on the grounds they were no longer protected by E.R.I.S.A.

The Fourth Circuit affirmed the district court in Record #93-2092 on December 29, 1994, petition for rehearing denied on February 6, 1995.

REASONS FOR GRANTING THE WRIT

The Fourth Circuit unpublished per

curiam opinion which is not a binding precedent in the Fourth Circuit affirming the district court's ruling that E.R.I.S.A./I.R.S. approved pension funds were no longer protected from attachment, garnishment or levy under the Employment Retirement Income Security Act's anti-alienation provision codified in 29 U.S.C. §1056(d)(1) prior to the fully funded Coleman pension plan being terminated pursuant to Title IV of E.R.I.S.A. 29 U.S.C. §1301 et. seq. and specifically §1341(b)(3)(i) is in direct conflict with published opinions of the Fourth Circuit, of other circuits, and the Supreme Court. It also denies the petitioner his equal protection of the above laws as guaranteed by the 5th and 14th Amendments of the Constitution of the United States and is contrary to public policy.

The crucial point in this case is whether or not the petitioner be allowed to purchase a irrevocable annuity from an insurer to provide him with his future monthly pension benefits pursuant to 29 U.S.C. §1341 as the district court relieved Roy Creasy, plan administrator of the Coleman pension plan, of his fiduciary duties as prescribed in 29 U.S.C. §1104 by allowing the plan administrator to dump Shumate's pension funds in the district court's registry rather than purchasing a irrevocable annuity from an insurer to provide Shumate his future benefits under the pension plan pursuant to §1341(b)(3)(i).

1. When does the anti-alienation provision cease to protect Shumate's benefits provided under an E.R.I.S.A. approved plan?

Section 1056(a) states that pension payments begin not later than 60 days after the participant terminates his service with his employer. Shumate was terminated from Coleman in February 1983. The Coleman plan provided that any participant with 30 years service could take his retirement at an actuary reduced pension based on a full pension at age 65. The petitioner having 31+ years service opted to take monthly payments on a life-only basis beginning March 1, 1983. Shumate was paid his pension for the months of March, April and May 1983. The Coleman bankruptcy trustee refused to allow the Coleman pension committee to pay 400+ Coleman employees their rightly pension when they were terminated in May 1983 and also ordered Shumate's monthly pension payments stopped all in violation of §1056, §1104. The bankruptcy trustee

of Coleman by taking control of the plan failed to discharge his duties solely for the benefit of the interest of the participants of the plan, §1109 breach of fiduciary duty, §1140 interference with participants rights, §1141 coercive interference and many other sections of E.R.I.S.A.

The trustee's actions were upheld by the district court and affirmed in the Fourth Circuit giving the Coleman bankruptcy trustee control over the Coleman pension plan and trust. Creasy v. Coleman Furniture Corp., 763 f.2d 656 (4 CCA 1985).

The court ordered plan administrator terminated the Coleman pension committee, the Coleman pension trust trustee, Wachovia Bank and Trust Co., and terminated the pension plan back to December 1, 1984, amending the plan and

paid all participants according the amended plan in August 1987 with exception of Shumate.

Shumate moved for civil enforcement of his pension rights under 29 U.S.C. §1132. Two issues developed in the action

1. The amount of Shumate's pension;

2. Who was to receive Shumate's pension, Shumate or his bankruptcy trustee and how it was to be paid? Shumate had opted for monthly payments and his trustee demanded lump sum payment.

Shumate and his bankruptcy trustee made a compromise agreement as to the amount needed to fund his early retirement beginning July 1, 1984, the amount determined on the basis of cost of a single payment annuity in December 1987 providing Shumate with monthly payments

beginning December 1, 1987 and continuing for his life time plus an amount representing monthly payments in the same amount and interest beginning July 1, 1984 and continuing through November 1, 1987 with interest accruing on these payments with the rate of 7.5% per annum. The method of payment to be determined by the litigation between Shumate and his bankruptcy trustee. (App. p. 32a infra)

The district court held that Shumate's pension was part of his bankruptcy estate. (reported in 83 B.R. 404) The Fourth Circuit reversed holding that Shumate's interest in the pension plan was excluded from the bankruptcy estate reported in 943 f.2d. 362 (1991) which was affirmed by the U. S. Supreme Court reported at 112 S.Ct. 2242 (1992).

After the Supreme Court denied Patterson's petition for rehearing in

August 1992, Shumate filed for turnover of his pension held in the district court's registry system.

NationsBank acquired a judgment against Shumate while the pension issue was lodged in the Fourth Circuit as Shumate was denied standing, his statutory rights of counterclaim, setoff, subordination and his constitutional rights of due process of law, issued a writ of execution and garnishment against the pension funds lodged in the district court's registry argued that when the funds were placed in the registry they were no longer protected by E.R.I.S.A.

The district court denied NationsBank's motion by its order of October 30, 1992 and November 12, 1992 in Civil Action #83-279-R, #86-276-R, #86-432-R and #86-433-R. NationsBank appealed and the Fourth Circuit affirmed the

district court in Record #92-2474 decided May 18, 1993. (App. p. 24a, infra)

On April 21, 1993 NationsBank issued a writ of execution for their lien and garnishment proceedings upon the clerk of the United States District Court for the Western District of Virginia for Shumate's pension funds held in the court's registry.

On June 1, 1993 Shumate petitioned for turnover of his pension funds from the district court's registry and to enjoin NationsBank from taking any action to collect, freeze or garnishee these funds while protected by E.R.I.S.A. On June 10, 1993 the district court ordered NationsBank's garnishment issued April 21, 1993 be dismissed and the funds turned over to Shumate on demand forthwith.

On June 11, 1993 Shumate received

his pension funds by a series of bank checks issued from Virginia First Savings Bank which held Shumate's pension funds for the district court's registry. Shumate immediately disbursed the checks representing the amount of his pension which was due him from June 1, 1983 through June 1, 1993. Virginia First issued two checks to Shumate being approximately $59,000 each to be issued to cover his future pension payments. On Monday, June 14, 1993, Shumate established a trust savings account to hold his future pension payments pending purchasing an insured annuity being account #54162-3 in Premier Bank, Pulaski, VA depositing only one of the checks as he had inadvertently failed to bring both to the bank. On June 15, 1995 the trust agreement was reworked and sent to Premier Bank's headquarters for

approval. (App. p. 31a, infra) On Wednesday, June 16, 1993, Premier Bank advised Shumate that NationsBank had filed a lien and garnishment procedure against the bank offered to return the funds to him of which he refused as he felt that the funds deposited in the trust account were still protected by E.R.I.S.A.

Shumate moved to quash NationsBank's collection procedure on the grounds that the funds were still protected by E.R.I.S.A. On June 30, 1993, (App. p. 7a, infra) the district court denied Shumate's motion to quash holding that the funds were no longer protected after they left the court's registry. The Fourth Circuit affirmed the district court's decision by unpublished curiam opinion on December 29, 1994, (App. p. 1a, infra) petition for rehearing denied

on February 6, 1995 in Record #93-2092. (App. p. 5a, infra)

29 U.S.C. §1056(d)(1) is most specific that each pension plan shall provide that benefits under the plan may not be assigned or alienated.

26 U.S.C. §401(a)(13) further reinforces E.R.I.S.A. that a pension trust can not constitute a qualified trust under this section unless the plan which such trust is a part provided under the plan may not be assigned or alienated.

There is basically an universal holding by all circuits that 29 U.S.C. §1056(d) applies to the proceedings of an employee pension plan that is being terminated. See Traveler's Insurance Co. v. Fountain City Federal Credit Union, 889 f.2d 264 (11 CCA 1989); also Smith v. Mirman, 749 f.2d 181 (4 CCA 1984);

Tenneco v. First Virginia Bank of Tidewater, 698 f.2d 688 (1983); General Motors Corp. v. Buha, 623 f.2d 455 (1980).

This court decided in Lanier Collections Agency and Services, 486 U.S. 825 (1988) that E.R.I.S.A. bars the alienation or assignment of benefits provided by E.R.I.S.A. pension plans pursuant to §1056(d)(1). This court declined to recognize any exception to E.R.I.S.A.'s anti-alienation provisions outside the bankruptcy context in Guidry v. Sheet Metal Workers Pension Fund, 493 U.S. 365 (1990). This court wiped out the bankruptcy context in Patterson v. Shumate, supra.

The lower courts in this case have not taken into consideration that 26 U.S.C. §401 et. seq. constitutes an integral part of an E.R.I.S.A. and more

particularly when the plan is being terminated or when a participant in the plan terminates voluntarily or involuntarily. The lower courts refused to take into consideration that Shumate did not cash the check or place it into his personal account. Shumate placed the funds into a trust account pending rollover or purchasing an annuity for his future pension payments .

These funds are protected by E.R.I.S.A. until the funds to the participant are paid out according the plan or according to the termination of the plan.

26 U.S.C. § 401(14)(c) states that a trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that unless the participant otherwise elects payment of the benefits under the

plan to participant will begin not later than the 60th day after the latest of the close of the plan or (C) the participant terminates his service with the employer or for the plan to continue its E.R.I.S.A./I.R.S. approval his monthly payment should have begun within 60 days after he was terminated in February 1983. By Shumate not being paid his monthly payments from June 1983 and not being allowed to receive his future payments in the form of an annuity jeopardizes the qualification of the Coleman pension trust as a tax exempt trust.

2. When does a fully funded single employer E.R.I.S.A./I.R.S. approved plan become terminated?

E.R.I.S.A. Title IV (29 U.S.C. §1301 et. seq.) is the prerequisite to termination of an employee retirement

plan. Phillips v. Bebber, 914 f.2d 31 (4 CCA 1990).

Section 1341 specifically lays out the procedure for termination of a single employer plan that is fully funded. Section 1421 requires that payment of benefits to a participant which has a value of $1,750 may not be paid out in a form other than an annuity. The normal payment for the Coleman plan was an annuity retirement benefit. (Article V, §5.01 as amended and restated in the plan dated December 1, 1984 as well as in previous plan dated December 1, 1976).

Section 1341(b)(3)(i) specifically states that the plan administrator shall purchase irrevocable commitments from an insurer to provide all benefit liabilities under the plan.

Section 1104(a)(1)(D) (fiduciary duties) specifically states that a

fiduciary (plan administrator) shall discharge his duties in accordance with the documents and instruments governing the plan so far as such documents and instruments are consistent with provisions of this Title or Title IV (29 U.S.C. §1301 et. seq.)

The pension trust has yet to be completely terminated because Shumate, a plan participant in the plan, has not had his future benefit liabilities placed in an irrevocable commitment from an insurer to provide his future benefits.

Nor has the Coleman plan administrator certified to the Pension Benefit Guaranty Board Shumate's benefits were paid according to the plan pursuant to 1341(b)(3)(B).

The Coleman bankruptcy trustee and plan administrator by counsel reported to the P.B.G.B. that all benefits had been

paid except Shumate on February 25, 1988. (App. p. 45a, infra)

Since Shumate elected to take his benefit on a monthly life-only payments E.R.I.S.A. continues to protect funds because funds deposited in the trust account for that purpose in Premier Bank to purchase an irrevocable commitment from an insurer to provide Shumate his future monthly benefits from the plan since the district court relieved the Coleman plan administrator of his fiduciary responsibilities Shumate has the right to purchase the annuity with E.R.I.S.A. protection until the monthly payments are received by him and converted to cash or exchanged for goods or property. The lower courts erred in relying on Tenneco v. First Virginia Bank of Tidewater, 698 f.2d 688 (4 CCA 1983) as Shumate did not constructively take

possession of the funds lodged in the trust account at Premier Bank. The panel in Tenneco (a published opinion) held that the statute and regulation make no distinction between funds which have become fully vested and subject to withdrawal and funds which are subject to periodic disbursement as an annuity. (at p-690) In Tenneco the plan participant Sweeney made a partial withdrawal from an on-going retirement E.R.I.S.A. approved plan and did not invest them in another E.R.I.S.A. approved account within the 60 day period allowed for that purpose. The Fourth Circuit affirmed the district court's ruling by Sweeney not placing these funds in another approved E.R.I.S.A. account within the 60 day period constituted constructive procession and no longer was protected by E.R.I.S.A.

There are considerable differences in this case. The Coleman plan was being terminated pursuant to rules under Title IV 29 U.S.C. §1301 et. seq. and more particularly §1341. Shumate like Sweeney were terminated. Shumate was also terminated before the Coleman plan was terminated and before the Coleman Furniture Chapter 7 was appointed. Sweeney had two E.R.I.S.A. approved accounts, one being a qualified thrift account the other a stock ownership plan. Shumate had an E.R.I.S.A. approved pension account plan. Sweeney drew down the bulk of both plans ($37,000+) leaving a balance of $5,000+. Sweeney took constructive possession of his funds and did not roll them over into an E.R.I.S.A. approved account.

Sweeney commingled his E.R.I.S.A. protected funds with other funds in a

brokerage account. (p. 690)

When Shumate was terminated on or about February 24, 1983, he was eligible for early retirement and took his pension beginning March 1, 1983 on a life-only basis. Shumate was paid his monthly benefits for March, April, May 1983 by the trustee of the Coleman pension trust being Wacovia Bank and Trust Company. These benefits were abruptly and contrary to E.R.I.S.A. stopped on June 1983 by the Coleman Chapter 7 bankruptcy trustee. The Coleman trustee was granted control of the Coleman plan and trust in 1985. Creasy v. Coleman Furniture, supra.

Unlike Sweeney, Shumate did not take constructive possession of his future pension payments by commingling the funds with other funds. (Sweeney placed his in a brokerage account with other funds) Shumate placed his in a trust account for

the purpose of being rolled over into another pension plan or to purchase an annuity to fund future pension payments pursuant to §1341(b)(3)(i).

Creasy crammed down a single cash payment to the participants in the Coleman pension plan increasing the surplus in the plan from $56,000 on December 1, 1981 to more than 1.5 million dollars in 1987 for the benefit of the creditors of Coleman and not for the participants of the plan. Six of the participants elected to take an annuity including Shumate. The other five already being retired and continuously receiving their pensions could easily see that the cash amount offered would not cover 24 months of their pension payments. The others not being able to get their pension for over four years and not knowing what their pension should

have been if they were allowed to receive their pension in May 1983 when they were terminated, took the cash and ran. The plan administrator whose office was in Roanoke (approximately 60 miles from Pulaski) further alienated himself from the participants by hiring a law firm in Roanoke to terminate the plan who never made themselves available to consult with the participants or their beneficiaries in Pulaski.

When Shumate moved for the turnover of his pension in 1992 he announced in open court he planned to take constructive possession of the funds owed him from June 1, 1983 to the date he received them and place the balance in an annuity to fund his future monthly payments on a life-only basis. He reconfirmed his proposed handling of his pension funds before and at the turnover

hearing on June 10, 1993. He did exactly what he said, taking possession of his past due payment on June 11, 1993 and receiving checks made out to Shumate by Virginia First Savings Bank in Roanoke, VA who was holding the funds for the district court's registry. On the next bank business day being June 14, 1993, Shumate placed these funds in a trust account pending placing the funds in another E.R.I.S.A. plan or an annuity providing future monthly pension payment on a life-only basis.

NationsBank liened on the funds held in the trust account on June 16, 1993. Shumate did not have constructive possession of these funds when he received them from the district court's registry by check drawn on Virginia First Savings Bank. Since E.R.I.S.A. preempt state law what constitutes a transfer and

when it is complete is a matter of federal law. McKenzie v. Irvine Trust Co., 323 U.S. 365 (1945). A regular check transfer is not complete until the bank cashes the check. Barnhill v. Johnson, 112 S.Ct. 1386 (1992). The check was not cashed it was transferred into another trust account pending placing these funds into another E.R.I.S.A. plan or annuity for future payments equally protected by E.R.I.S.A.

The plan administrator reported to P.B.G.C. by counsel that all distributions were paid to all individuals on or about July 1, 1987 with exception of Shumate. (App. p. 45a) The Coleman plan is not fully terminated until these funds held in trust in Premier Bank are invested in an annuity providing future pension payments or are placed into another E.R.I.S.A. approved

plan. The purchase of an irrevocable commitment is a pivotal implementation portion of the standard termination and is covered in 29 U.S.C. §1341(b)(3)(A)(i). See Waller v. Blue Cross of California, 32 f.3d 1337 (9 CCA 1994).

As part of the termination process, the plan sponsor is required to purchase irrevocable annuity contracts from an insurance company that cover the benefits of all plan participants and beneficiaries. Larson v. Northrop Corp. 21 f.3d 1164 (D.C.CCA. 1994).

Since the district court allowed the Coleman bankruptcy trustee and plan administrator to terminate the Coleman plan without providing for an annuity for Shumate's future pension payments pursuant to 29 U.S.C. §1341 it is now the federal court's responsibility that the

funds deposited in the trust account earmarked for Shumate's future pension payments be protected pending a reasonable time to place these funds in an annuity or other E.R.I.S.A. plan.

Contrary to the holding of the lower court in its decision, 26 U.S.C. §401 et. seq. is an essential part of E.R.I.S.A. §401(13) provides a trust shall not constitute a qualified trust unless the plan states the benefits may not be assigned or alienated. §401(12) provides that a private employer pension trust is not a qualified trust if the plan is terminated contrary to Title IV of E.R.I.S.A. (29 U.S.C. §1301 et. seq.) §401(14) parallels 29 U.S.C. §1056 that a participant payments must begin within 60 days after the participant is terminated for the pension trust to be a qualified trust.

If the pension trust is not a qualified trust most pension plans would not exist as the funds placed in the trust would be taxable income to the settler of the trust. Also the income generated by the trust would be taxable to the trust annually. If the error of not continuing to pay Shumate monthly benefits after June 1, 1983 can not be corrected retroactive by court order in theory the Coleman pension trust becomes a non-qualified trust causing the Coleman pension and trust and their fiduciaries to owe a sizeable tax bill and interest from 1983.

The lower courts have denied Shumate his past and future benefits by ruling contrary to 29 U.S.C. §1001 et. seq. and 26 U.S.C. §401 et. seq. as enumerated above.

3. Are the lower courts ruling that

Shumate's future pension payments can not be placed in an insured annuity for future pension payments contrary to public policy?

Congress findings and declarations of policy as enumerated in 29 U.S.C. §1001(a)(b) and (c) are as follows:

(a)(1) Single employer defined benefit pension plans have a substantial impact on interstate commerce and are affected with a national interest.

(a)(2) The continued well being in retirement income security of millions of workers, retirees, and their dependents are directly affected by such plans.

(a)(3) The existence of a sound termination insurance system is fundamental to the retirement income security of participants and beneficiants of such plans.

(b)(1) It is desirable to increase the

likelihood that full benefits will be paid to the participants and beneficiaries of such plans.

The declaration of policy creating this Title are

(c)(1) To foster and facilitate interstate commerce.

(c)(2) To encourage the maintenance and growth of single employer defined benefit pension plans.

(c)(3) To increase the likelihood that participants and beneficiaries under the single employer defined benefit pension plans will receive their full benefits.

This court has upheld the policy as defined by Congress stated above in Nachman Corp. v. P.B.G.C., 446 U.S. 359, 375 (1980), stating that if a worker has been promised a defined pension benefit upon retirement -- and if he has fulfilled what conditions are required to

obtain a vested benefit - he actually will receive it. Shumate has been promised a defined pension benefit upon retirement and he has fulfilled the conditions required to obtain a vested benefit beginning in March 1983 and it is now time for him to start actually receiving his future pension benefit payments to comply with public policy of E.R.I.S.A. as defined by Congress and upheld by this court.

CONCLUSION

The question of when does the anti-alienation provision of an E.R.I.S.A. approved pension cease to protect pension plan funds needs to be settled with finality so that all decisions by lower courts, whether the opinions be published or unpublished, are consistent.

The issue of when a fully funded

single employer E.R.I.S.A./I.R.S. approved pension becomes terminated needs also to be determined with a finality to prevent the lower courts from compromising the law as in this case preventing the petitioner (a participant in the Coleman plan) from receiving his monthly benefits from June 1983 until June 1993 and still preventing the participant from placing or having the funds placed in an insured annuity for the payment of future monthly pension payments.

The lower court's ruling in this case is contrary to Congress' intention and declaration of policy as well as statutes for the administration of a single employer plan.

The lower court in granting a bankruptcy trustee the right to take control of pension plan and trust created

a conflict of interest as the bankruptcy trustee did not discharge his duties with respect to the Coleman pension plan solely in the interest of the participants and beneficiaries of the plan pursuant to §1104. The lower courts allowed the Coleman bankruptcy trustee to delay paying Shumate and over 400 other participants in the Coleman plan from receiving their pension in June 1983 is contrary to §1056(a) and congressional intent and policy.

The lower courts in this case has allowed the plan administrator to circumvent Title IV of E.R.I.S.A. 29 U.S.C. §1301 et. seq. and specifically §1341(b)(3)(i) by not purchasing for Shumate an irrevocable commitment from an insurer to provide for his future pension payments he is entitled to under the plan. The lower courts in approving the

Coleman bankruptcy trustee and plan administrator's handling of the Coleman pension plan and trust grants him immunity for not administering the plan for the sole interest of participants of the plan.

The lower court in denying Shumate the right to place the funds now segregated in a trust account into an insured annuity to provide him his future monthly pension payments pursuant to 29 U.S.C. §1001 et. seq. and 26 U.S.C. §401 et. seq. all are in violation of the statutes regulating an E.R.I.S.A. approved pension plan and the intent and policy of Congress as upheld by this court in Nachman, supra and many other rulings since.

The petitioner prays that a writ of certiorari be granted as the Court of Appeals for the Fourth Circuit in this

action has rendered decisions in conflict with its own decisions, other courts of appeal and this court in interpreting 29 U.S.C. §1101 et. seq. as more particularly described above and sanctioned such a departure by the district court as to call for an exercise of this court's power and supervision to correct the travesty of justice thus far committed.

APPENDIX

DOCUMENT:	Page
Opinion of the Court of Appeals for the 4th Circuit decided 12/29/94	1a
Decision of the Court of Appeals for the 4th Circuit denial for rehearing dated 2/6/94	5a
Decision and memorandum of opinion of the U. S. District Court for the Western District of VA entered 6/29/93	7a
Decision of the U. S. District Court for the Western District of VA denying motion to alter or amend dated 7/15/93	20a
Actuarial report on Shumate's early retirement dated 4/13/83	22a
Internal Revenue Service form W-2P year 1983 payer Wachovia Bank and Trust Co. for Coleman Furniture pension plan, recipient Joseph B. Shumate, Jr.	23a
Decision of the Court of Appeals for the 4th Circuit in NCNB v. Shumate, slip. op. #92-2474 (4 CCA 5-18-1993)	24a
6/14/93 trust agreement between Shumate and Premier Bank	29a
6/15/93 trust agreement between Shumate and Premier Bank	31a

Settlement agreement between Coleman bankruptcy trustee and Coleman pension plan administrator and Shumate dated 11/20/87 32a

Order of the U. S. District Court for the Western District of Virginia placing the funds for Shumate's pension in the District Court's registry 40a

Coleman trustee counsel's to Pension Board Guaranty Corp. stating all participants in the Coleman plan had been paid except Shumate, dated 2/25/88 45a

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NATIONSBANK OF NORTH CAROLINA, N.A., successor to NCNB National Bank of North Carolina; NCNB National Bank, successor to NCNB Financial Services, Inc.,
Plaintiff-Appellee,

and

ROY V. CREASY, Trustee,
Plaintiff,

v. No. 93-2092

JOSEPH B. SHUMATE, JR.,
Defendant-Appellant,

and

COLEMAN FURNITURE CORP.; COLEMAN FURNITURE CORP. PENSION PLAN,
Defendants.

Appeal from the United States District Court for the Western District of Virginia, at Roanoke.
Glen M. Williams, Senior District Judge
(CA-83-279-R, CA-96-432-R, CA-86-433-R, CA-86-272-R)

Submitted: October 18, 1994
Decided: December 29, 1994

Before MURNAGHAN and NIEMEYER,
Circuit Judges, and SPROUSE,
Senior Circuit Judge

Affirmed by unpublished per curiam opinion.

COUNSEL

Joseph B. Shumate, Jr., Appellant Pro Se. Stephen McQuiston Hodges, PENN, STUART, ESKRIDGE & JONES, Abingdon, Virginia, for Appellee.

unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

Joseph B. Shumate, Jr., appeals the district court's order denying his motion to quash a notice of lien on his bank account filed by NationsBank to satisfy a judgment obtained by its predecessor in interest, NCNB Financial Services, Inc. Shumate was president of Coleman Furniture Company and was a participant in Coleman's pension plan. Coleman filed for bankruptcy in 1982; Shumate's personal bankruptcy followed two years later. A dispute then arose among Shumate, the trustee of Shumate's bankruptcy estate (the "Shumate Trustee"), and the trustee of Coleman's bankruptcy estate (the "Coleman Trustee") over Shumate's interest in the Coleman pension plan. Shumate settled the dispute with the Coleman Trustee for $250,000, and agreed to payment of this amount into

the district court's registry, pursuant to Fed. R. Civ. P. 67, pending the outcome of the dispute between Shumate and the Shumate Trustee. That disput was ultimately settled by the United States Supreme Court which held that Shumate's interst in the Coleman pension fund was not includible in his bankruptcy estate. Patterson v. Shumate, 60 U.S.L.W. 4550 (U.S. 1992).

While that case was pending, NCNB (now NationsBank) obtained a judgment against Shumate as guarantor on a note to Coleman and also on a personal promissory note. This Court affirmed the district court's award to NCNB, but remanded for recalculation of interest and attorneys' fees. NCNB Fin. Servs. v. Shumate, No. 90-2026(L) (4th Cir. Jan. 15, 1992) (unpublished). The revised judgment, as of June 1993, was $410,000, plus interest from July 26, 1990.

NCNB initially attempted to satisfy its judgment by levying on the fund while it was still in the district court's registry. In NCNB Fin. Servs. v. Shumate, No. 92-2474 (4th Cir. May 18, 1993) (unpublished), this Court determined that the funds were unreachable by creditors until after an actual, and not constructive, distribution was made.

In June 1993, the district court clerk paid out the $250,000, plus interest, to Shumate. NationsBank immediately filed a notice of lien on Shumate's bank account in which he had deposited the money. The district court

detemrined that the funds were no longer protected by the anti-alienation provisions afforded by ERISA (29 U.S.C. § 1056(d)(1) (1988)) and denied Shumate's motion to quash the notice of lien as to funds originating from the Coleman pension plan. Shumate's motion to alter or amend the judgment pursuant to Fed. R. Civ. P. 59 was also denied. Shumate noted a timely appeal.

Shumate contends that the ERISA anti-alienation protection continues during the sixty-day rollover period provided by I.R.C. §§402, 403 (1988). Our review of the district court's opinion and this Court's decision in Tenneco, Inc. v. First Virginia Bank, 698 F.2d 688 (4th Cir. 1983) discloses that Shumate's contention is without merit. Accordingly, we affirm on the reasonong of the district court. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the Court and argument would not aid the decisional process.

AFFIRMED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
February 6, 1995

No. 93-2092
CA-86-272-R
CA-86-433-R
CA-86-432-R
CA-83-279-R

NATIONSBANK OF NORTH CAROLINA, N.A., successor to NCNB National Bank of North Carolina; NCNB National Bank, successor to NCNB Financial Services, Inc.,
Plaintiff-Appellee,

and

ROY V. CREASY, Trustee,
Plaintiff,

v.

JOSEPH B. SHUMATE, JR.,
Defendant-Appellant,

and

COLEMAN FURNITURE CORP.; COLEMAN FURNITURE CORP. PENSION PLAN,
Defendants.

On Petition for Rehearing with Suggestion for Rehearing In Banc

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

NCNB FINANCIAL SERVICES, INC.,
Plaintiff

CA-86-0433-R

v.

CA-83-0279-R

JOSEPH B. SHUMATE, JR.,
Defendant

NCNB FINANCIAL SERVICES, INC.,
Plaintiff

v. CA-86-0432-R

COLEMAN FURNITURE CORP.,
Defendant

ROY V. CREASY, TRUSTEE,
Plaintiff

v. CA-86-0272-R

COLEMAN FURNITURE CORP. PENSION PLAN,
Defendant

ORDER

For the reasons set forth in the Memorandum Opinion entered this day, Defendant Joseph B. Shumate, Jr.'s Motion to Quash the Notice of Lien issued by NCNB on Shumate's bank accounts is DENIED

as to funds originating from the Coleman Furniture Corporation Pension Plan. As to funds originating from social security income, Shumate's Motion to Quash the Notice of Lien is granted on $163.15 in his checking account number 2543192 with Premier Bank, Inc., of Wytheville, Virginia.

ENTER: This 29 day of June, 1993.

/s/ Glen M. Williams
Senior U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

NCNB FINANCIAL SERVICES, INC.,
Plaintiff

CA-86-0433-R

v.

CA-83-0279-R

JOSEPH B. SHUMATE, JR.,
Defendant

NCNB FIANCIAL SERVICES, INC.,
Plaintiff

v. CA-86-0432-R

COLEMAN FURNITURE CORP.,
Defendant

ROY V. CREASY, TRUSTEE,
Plaintiff

v. CA-86-0272-R

COLEMAN FURNITURE CORP. PENSION PLAN,
Defendant

MEMORANDUM OPINION

Joseph B. Shumate, Jr. (Shumate), brings a Motion to Quash a notice of lien on his bank account filed by NationsBank

of North Carolina, N.A. (the Bank).* Shumate contends that some of his funds are protected from attachment, garnishment, or levy under Employment Retirement Income Security Act's (ERISA's) anti-alienation provision, codified at 29 U.S.C.A. § 1056(d). Shumate claims that other monies constitute social security benefits, protected from legal process by 42 U.S.C.A. § 407(a).

Funds Traceable to Pension Plan

Shumate first seeks to quash the Bank's levy on certain funds traceable to the Coleman Furniture Corporation Pension Plan. By two Memorandum Opinions, issued in October and November, 1992, this Court held that $250,000 plus interest paid into the court registry as part of a

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NationsBank is successor to NCNB National Bank of NC in this action; NCNB National Bank was successor to NCNB Financial Services, Inc.

dispute between the Pension Plan Trustee Roy V. Creasy and Shumate was still protected by ERISA. Both opinions were affirmed by the Fourt Circuit in an unpublished opinion. See NCNB Financial Services, Inc. v. Shumate, et. al, Slip Op. No. 92-2474 (4th Cir. May 18, 1993).

At the time of those decision, in the Fall of 1992, this CCourt refused to determine whether ERISA continued to protect funds actually paid out to an employee; the funds still rested in the court registry, and the matter was not ripe for adjudication. However, in June, 1993, the Court CLERK PAID OUT THE $250,000 plus interest to Shumate, and Shumate deposited some of this money into a checking account. The Bank immediately issued a notice of lien to Shumate's bank, Premier Bank, Inc. of Wytheville, Virginia.

Shumate argues that the Bank may not attach the funds traceable to the Pension Plan by any means for 60 days after his receipt of the funds from the court registy. Shumate bases his argument on ERISA's prohibition against alienation, 29 U.S.C.A. § 1056(d), and on the 60-day rollover period provided by the tax code, 26 U.S.C.A. § 403(4). Shumate points to the Fourth Circuit's decision in Tenneco, Inc. v. First Virginia Bank, 698 F.2d 688 (4th Cir. 1983), to support his contention that the 60-day rollover period in 26 U.S.C.. § 403(4) protects employees' funds from legal process while they decide whether or not to place the funds in another ERISA-qualified plan.

The Tenneco case did not decide the exact issue in contention today; however, it did state that because the debtor had not rolled over certain funds during the

60-day period provided for that purpose, those funds were subject to garnishment. Tenneco, 698 F.2d at 691. Shumat enow argues that because the 60-day period has not run out, his funds are still protected by ERISA.

26 U.S.C.A. § 403(4)(A) states that:

> [i]f . . . any portion of . . . an employee['s] . . . annuity . . . is paid to him, . . . [and] the employee transfers any protion of the property in such distribution to an eligible retirement plan, . . . then such distribution (to the extent so transferred) shall not be includible in gross income for the taxable year in which paid.

According to 26 U.S.C.A. § 403(4)(B) and § 402(5)(C), the employee must ransfer the funds to the second ERISA-qualified plan within 60 days of receipt.

ERISA does not explicitly incorporate or cross-reference to 26 U.S.C.A. §§ 402 and 403. There is no

reason to believe that ERISA's prohibition against alienation has any relation whatsoever to the 60-day exemption period from federal income taxation. As stated by the bankruptcy court in In re Toone, "[w]hatever the status of the funds may be during the roll-over period for purposes of taxation . . . they are no longer within the [anti-alienation] protection afforded by ERISA and the Internal Revenue Code."

This view of ERISA's relatin to the 60-day rollover period in 26 U.S.C.A. § 403 is supported by dicta in the Supreme Court's decision in Mackey v. Lanier Collection Agency & Service, Inc., 486 U.S. 825 (1988), which stated that § 206(d)(1) of ERISA, codified at 29 U.S.C.A. § 1056(d)(1), "bars the assignment or alienation of pension plan benefits, and thus prohibits the use of

state enforcement mechanisms only insofar as they prevent those benefits from being paid to plan participants." 486 U.S. at 836 (emphasis added in part). See Brosamer v. Mark, 561 N.E.2d 767 (Ind. 1990) (holding that once an employee deposits pension plan funds in a bank account, ERISA no longer protects the funds, following the Fourth Circuit in Tenneco).

Furthermore, today's decision on this issue is in harmony with the Fourth Circuit's decision in Tenneco. That case deemed that ERISA protects funds even if they were constructively received by the employee; that is, if the funds still remained in the pension plan but could be paid out at any time. However, once the line of actual receipt is crossed, as it undoubtedly is in this case, ERISA no longer protects funds despite their

origination in an ERISA-qualified pension plan. The rollover period provided by the tax code is for income tax purposes only, andd has no effect on third party access to funds actually paid out to the employee.

Social Security Benefits

Shumate also claims an exemption for funds in another account that he maintains are social security benefits. 42 U.S.C.A. § 407(a) prohibits attachment, levy, or ganishment on such benefits. Social Security benefits are protected even if they are commingled in a savings or checking account with funds from other sources. See Philpott v. Essex County Welfare Board, 409 U.S. 413, 416-17 (1973). If the recipient of social security benefits commingles the benefits with other funds, he is entitled to protection as to those funds that are

reasonably traceable to social security income. See Philpott, 409 U.S. at 416-17.

Shumate's bank statements for his bank account number 2543192 with Premier Bank demonstrate that for the last six months, Shumate has deposited some money from his $758.00 social security check each month, mixed in with deposits from other sources. After careful examination of these records using the first in, first out, accounting method, this Court concludes that Shumate clearly withdres amounts exceeding the social security benefits, usually within the same month, exhausting the funds that might be traced to social security.

For example, Shumate deposited $100 from social security on May 5, 1993, bringing his total balance up to $186.87. He then deposited $500 from other

sources. From May 11 to May 12, Shumate withdrew $627.69; using the first in, first out accounting method, Shumate had exhausted the $100 (as well as the $86.87, which based on this Court's calculations, was not traceable to social security income).

On June 9, 1993, Shumate's balance stood at $63.40, none of which was traceable to social security benefits. On June 10, 1993, Shumate deposited $400 to his account from his social security check, his most recent deposit from such a source. On June 13, 1993, Shumate deposited $461.32 from another source. Currently, his balance stands at $624.47. Although Shumate has not provided this evidence (his latest bank statement is current through June 9, 1993) Shumate obviously withdrew $300.25 over this period. Using the same accounting method

as before, the only part of the $624.47 that constitutes social security benefits is $163.15. Therefore, Shumate is entitled to the protection accorded to social security benefits by 42 U.S.C.A. § 407, but only as to $163.15.

Accordingly, Shumate's Motion to Quash is denied as to the funds that originated from the Coleman Pension Plan. As to the notice of lien on Shumate's social security benefits, Shumate is entitled to protection on $163.15 of the funds in his checking account number 2543192 with Premier Bank, Inc. of Wytheville, Virginia.

ENTER: This 29 day of June, 1993

/s/ Glen M. Williams
Senior U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

NCNB FINANCIAL SERVICES, INC.,
Plaintiff

CA-86-0433-R

v.

CA-83-0279-R

JOSEPH B. SHUMATE, JR.,
Defendant

NCNB FIANCIAL SERVICES, INC.,
Plaintiff

v. CA-86-0432-R

COLEMAN FURNITURE CORP.,
Defendant

ROY V. CREASY, TRUSTEE,
Plaintiff

v. CA-86-0272-R

COLEMAN FURNITURE CORP. PENSION PLAN,
Defendant

O R D E R

This case is before the court on motion of Joseph B. Shumate, Jr. pursuant to Rule 52(d) F.R.C.P. to alter or amend this court's order of June 30, 1993 in the above cases.

The court overrules the motion. The court hereby grants a stay of execution of its order as to any timely filed appeal or cross-appeal filed by the parties without further motion or hearing.

The Clerk of this court shall certify copies of this order to Joseph B. Shumate, Jr., to Stephen M. Hodges, Counsel for Nationsbank, and to Premier Bank, Wytheville, Virginia.

ENTER: This the 15th day of July, 1993.

/s/ Glen M. Williams
Senior U.S. District Judge

Meidinger, Inc.
6606 West Broad St.
P.O. Box 27506
Richmond, VA 23261
804-285-7385

April 13, 1983
CONFIDENTIAL

Mr. R.D. Gunn
Coleman Furniture Corp.
P.O. Box 980
Pulaski, VA 24301

Dear Mr. Gunn:

RE: Joe B. Shumate, Jr.

As requested, we have calculated the retirement benefit payable to Mr. Shumate. He is entitled to receive monthly benefit of $1,732.62 beginning March 1, 1983 on a life only basis.

Our computations were based on the following information:

Date of Birth - June 6, 1929
Date of Employment - Sept. 17, 1951
Normal Retirement Date - July 1, 1994
Date of Retirement - Feb. 24, 1982
Yrs of Credited Serv @ DOR - 31yr 2 mo
Annual Final Average Pay - $130,867.79

If you have any questions, please let us know.

Sincerely,
/s/ Debra S. Passmore
(Mrs.) Debra S. Passmore
Senior Actuarial Assistant

FORM W-2P
OMB No. 1545-0008
Statement for Recipients of Periodic Annuities, Pensions, Reired Pay of IRA Payments

Payer: Wachovia Bank & Truste Co. TTE
P.O. Box 3075
Winston-Salem, NC 27102

Year: 1983

56-0176030

Recipient's social security no: 231246423

Gross Annuity, pension, etc: 5197.86

Taxable amount: 5197.86

Federal income tax withheld: 0

Recipient's name: Shumate Jr, Joe B
1217 Memorial Drive
Pulaski, VA 24301

State income tax withheld: 0

Name of State: N.C.

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NCNB FINANCIAL
SERVICES, INC., (now
NationsBank),
Plaintiff-Appellant,

v. No. 92-2474

JOSEPH B. SHUMATE, JR.,
JOHN R. PATTERSON, Trustee;
COLEMAN FURNITURE CORP;
ROY V. CREASY, Trustee;
COLEMAN FURNITURE CORP,
PENSION PLAN,
Defendants-Appellees.

Appeal from the U.S. District Court for the Western District of VA, at Roanoke
Glen M. Williams, Senior District Judge
(CA-83-279-R, CA-86-433-R,
CA-86-432-R, CA-86-272-R)

Submitted: February 18, 1993

Decided: May 18, 1993

Before MURNAGHAN and NIEMEYER, Circuit Judges, and SPROUSE Senior Circuit Judge

Affirmed by unpublished per curiam opinion.

COUNSEL

Stephen McQuiston Hodges, PENN, STUART, ESKRIDGE & JONES, Abingdon, VA, for Appellant. Joseph B. Shumate, Jr.,

Pulaski, VA; John R. Patterson, Roanoke, VA; William M. Mercer-Meidinger, Richmond, VA; Roy V. Creasy, VOGEL & CROMWELL, Roanoke, VA for Appellees.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

NCNB Financial Services, Inc. (NCNB) appeals the district court's order denying its motion for payment of funds held in the court registry and the order denying its motion to alter or amend judgment under Fed. R. Civ. P. 59. The issue is whether Joseph Shumate's pension fund benefit, which has been held in the district court's registry since 1987, is still entitled to protection under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C.A. §§ 1001-1461 (West 1985 and Supp. 1992), or whether it is subject to garnishment by NCNB in satisfaction of its judgment against Shumate.

Shumate was president of Coleman Furniture Company and was a participant in Coleman's pension plan. It is undisputed that this plan was a "qualified plan" under ERISA. See Patterson v. Shumate, 60 U.S.L.W. 4550, 4552 (U.S. 1992); 29 U.S.C.A. § 1056(d)(1) (West Supp. 1992). Coleman filed for reorganization under Chapter 11 of the Bankruptcy Code in 1982; Shumate's personal bankruptcy followed two years

later. A dispute then arose among Shumate, the trustee of Shumate's bankruptcy estate (the "Shumate trustee"), and the trustee of Coleman's bankruptcy estate (the "Coleman trustee") over Shumate's interest in the Coleman pension plan. Shumate settled the disput with the Coleman trustee for $250,000 and agreed to payment of this amount into the district court's registry, pursuant to Fed. R. Civ. P. 67, pending the outcome of the dispute between Shumate and the Shumate trustee.

The dispute between Shumate and the Shumate trustee, over the inclusion of Shumate's pension benefit in his bankruptcy estate, was ultimately settled by the United States Supreme Court. Patterson v. Shumate, 60 U.S.L.W. 4550 (U.S. 1992). The Supreme Court upheld this Court's decision that Shumate's interest in the Coleman pension fund was not includible in his bankruptcy estate. See Shumate v. Patterson, 943 F.2d 362 (4th Cir. 1991).

While the Pension matter was pending, NCNB obtained a judgment against Shumate as guarantor on a note to Coleman and also on a personal promissory note. This Court affirmed the district court's award to NCNB, but remanded for recalculation of interest and attorneys' fees. NCNB Fin. Servs. v. Shumate, No. 90-2026 (4th Cir. Jan. 15, 1992) (Unpublished). The revised judgment, as of March 1992, totalled $410,000.

The present appeal stems from NCNB's attempt to partially satisfy its judgment

by levying on Shumate's pension fund, which is still be held in the district court. The district court determined that (1) the fund was absolutely protected by ERISA while in the hands of the district court, and (2) that its status once paid to Shumate was not ripe for decision because he had not yet received the funds. NCNB appeals.

First, the district court was correct in determining that Shumate's pension fund was absolutely protected by ERISA while in the district court's registry. NCNB admits that "statutes and regulation proscribe garnishment of employee benefits held in a qualified plan." (Appellant's informal brief, p.9).* See Tenneco v. First Virginia Bank, 698 F.2d 688, 689-90 (4th Cir. 1983) ("[A]n employee's accrued benefits under such a qualified plan may not be reached by judicial process in aid of a third-party creditor," even if the benefits are fully vested and may be withdrawn at the employee's request). NCNB argues that this protection no longer applies, however, because the funds are not being held in an ERISA qualified plan, but rather in the district court's registry. It is NCNB's position that the benefits were "distributed" to Shumate when the Coleman trustee paid the funds into the district court's registry. The district court disagreed, finding that "[w]hat is dispositive, according to cases interpreting ERISA, is whether the assignment of the benefits occurred after an actual, and not constructive, distribution was made to the employee."

See Tenneco, 698 F.2d at 690; See also Smith v. Mirman, 749 F.2d 181 (4th Cir. 1984). We find no support for NCNB's position. Therefore, we agree with the district court's conclusion.

Second, the district court correctly determined that the fate of the funds once in Shumate's hands was not ripe for decision as no payout has yet occurred. Shumate has a sixty-day rollover period in which to invest the pension funds in another qualified plan. 26 U.S.C. § 402(a)(5). Because it is impossible to know yet whether Shumate will take advantage of this provision, the district court was unable to rule on the bank's ability to garnish the funds once they were turned over to Shumate. Therefore, we affirm both orders of the district court appealed by NCNB. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the Court and argument would not aid the decisional process.

AFFIRMED

PREMIER BANK INC.

Ownership of Account-Personal:
X-Trust

Date Opened - 6/15/93
By - VD
Date of Birth - 6/6/29
Present Employer - self

Backup Withholding Certifications
TIN: 231-24-6423

X Taxpayer ID Number - the Taxpayer Identification Number shown abive (TIN) is my correct taxpayer indentification number.

/s/ Joseph B. Shumate, Jr.

Account Owner Name & Address:
Joseph B. Shumate Jr. trustee
for Coleman Pension Fund
P.O. Box 2092
Pulaski, VA 24301

Account Number: 54162-3
Number of signatures required: 1

Type of Account: X-Existing
X-Personal
X-Savings

Signature(s) - The undersigned agree(s) to the terms stated on the front and back of this form, and acknowledge(s) receipt of a completed copy on today's date. The undersigned also acknowledge(s) receipt of a copy of and agree(s) to the terms of the following disclosure(s):

X-Deposit Account Disclosure

X-Funds Availability Disclosure

/s/ Joseph B. Shumate Jr.

Joseph B. Shumate, Jr., temporary trustee for the pension funds belonging to him deposited in Premier Bank's savings account #54162-3 during the rollover period from the Coleman Furniture E.R.I.S.A. approved plan to another approved plan pursuant to 26 U.S.C. §402.

/s/ Joe B. Shumate, Jr.
Joseph B. Shumate, Jr.

accepted: /s/ J. Gray

SETTLEMENT AGREEMENT

THIS AGREEMENT, dated November 12, 1987, is between ROY V. CREASY, Trustee in Bankruptcy of Coleman Furniture Corporation and Plan Administrator of the Coleman Furniture Corporation Pension Plan ("Creasy"); JOSEPH B. SHUMATE, JR. ("Shumate"); JOHN R. PATTERSON, Trustee in Bankruptcy for Joseph B. Shumate, Jr. ("Patterson"); and the COLEMAN FURNITURE CORPORATION PENSION PLAN ("Plan").

A. Creasy, the Plan and Patterson are currently involved in a law suit entitled In Re Roy V. Creasy, Trustee in Bankruptcy for Coleman Furniture Corporation v. Coleman Furniture Corporation Pension Plan; Civil Action No. 86-0272-R in the United States District Court for the Western District of Virginia, ("the Suit").

B. Shumate, Creasy and Patterson are or

have been involved in an adversary proceeding styled John R. Patterson, Trustee v. Roy V. Creasy, Trustee in Bankruptcy for Coleman Furniture Corporation and Joseph B. Shumate, Jr.; Adversary Proceeding No. 7-87-0133 in the United States Bankruptcy Court for the Western District of Virginia (the "Adversary Proceeding").

C. In the course of this litigation Shumate has disputed the amount of his benefits from the Plan as determined by Creasy. Shumate has also alleged that Creasy has breached his fiduciary duty to Shumate as Plan Administrator of the Plan. Creasy and Shumate wish to resolve all matters between themselves regarding the amount and method of payment of Shumate's benefits from the Plan and all other claims that Shumate may have against Creasy arising out of Shumate's

participation in the Plan and Creasy's administration of the Plan.

D. Shumate has filed a complaint with the Pension Benefit Guaranty Corporation alleging that Creasy has improperly determined the benefits under the Plan in connection with the termination of the Plan.

E. The parties intend that this agreement will settle all matters between Creasy and Shumate with respect to the Plan, but that this agreement does not resolve the dispute between Patterson and Shumate regarding the proper recipient and the proper method of payment of Shumate's benefits from the Plan.

THEREFORE, in consideration of the following mutual agreements, the parties agree that:

1. Creasy shall direct Signet Trust Company, the Trustee of the Plan, to pay

$250,000.00 in escrow to the Clerk of the United States District Court for the Western District of Virginia to be invested in interest-bearing accounts in federally-insured banks or savings and loan associations provided that no more than $100,000.00 of principal shall be invested in any one institution (unless otherwise agreed by Shumate and Patterson with the court's approval) during the litigation between Shumate and Patterson.

2. Upon payment to the District Court Clerk by Signet Trust Company, Shumate and Patterson shall release and discharge fully and forever Creasy, the Plan, Signet Trust Company, all other fiduciaries of the Plan from any and all claims, demands, and causes of actions which arise from any purported acts, omissions, transactions, obligations, or events connected with the participation

of Shumate in the Plan or referred to in the pleadings of the Suit or the Adversary Proceeding.

3. This Agreement is based on Shumate's benefits determined as if he had elected early retirement benefits beginning July 1, 1984. The amount of the payment from the Plan for the payment of Shumate's benefits pursuant to this Agreement has been determined on the basis of the cost of a single payment annuity providing Shumate with monthly payments of $1,603.23 beginning December 1, 1987, and continuing for his lifetime, plus an amount representing monthly payments in the same amount beginning July 1, 1984, and continuing through November 1, 1987, and accrued interest on these payments at the rate of 7-1/2% per year. The foregoing notwithstanding, the funds paid from the Plan to the Court and the income

earned by this fund shall be the sole source of funds to satisfy the payment of Shumate's benefits from the Plan, and the amount of these benefits shall be determined by the total amount of the fund held in escrow by the Clerk when the litigation between Patterson and Shumate is resolved.

4. The method of payment of Shumate's benefits, whether as a lump-sum, an annuity, installments or some combination of these, shall be determined by the litigation between Shumate and Patterson, or any settlement therein, and shall not involve or affect Creasy in any way.

5. The parties agree that they shall seek to have this settlement approved and included, to the extent necessary or appropriate, in an order of the court. If the court's approval is not obtained, then this settlement agreement shall

become void at the election of any party.

6. Shumate shall notify the Pension Benefit Guaranty Corporation of the resolution of his dispute with Creasy and the Plan. Shumate shall execute whatever documents are necessary to terminate the PBGC administrative proceeding.

7. Shumate acknowledges that Creasy has not warranted the income tax consequences of this settlement in any way, and Shumate is not relying on Creasy as to the income tax consequences of this settlement.

8. The parties agree that any term of this agreement, including the payment of the amount specified in paragraph 1 of this agreement should not be construed as an admission or acknowledgment by any party of the accuracy of any allegation or of any wrongdoing under Federal, state or local law.

9. This agreement constitutes the complete understanding between the parties.

WITNESS the following signatures:

/s/ Roy V. Creasy
Roy V. Creasy, Trustee in Bankruptcy of the Coleman Furniture Corp and Plan Administrator
date: 11/20/87

/s/ Joseph B. Shumate, Jr.
Joseph B. Shumate, Jr.
date: 11/20/87

/s/ John R. Patterson
John R. Patterson, Trustee in Bankruptcy for Joseph B. Shumate, Jr.
date: 12/1/87

COLEMAN FURNITURE CORP. PENSION PLAN

/s/ Roy V. Creasy
by Roy V. Creasy, Plan Administrator
date: 11/20/87

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
(Roanoke Division)

IN RE:
ROY V. CREASY, Trustee
in Bankruptcy for
Coleman Furniture Corp.
Plaintiff

v. CA-87-0272-R

COLEMAN FURNITURE CORP.
PENSION PLAN
Defendant

O R D E R

This matter came to be heard upon the pleadings previously filed and the agreement of the parties as shown by their endorsement of this Order.

1. The Court finds that two issues are before it regarding payment of the benefits of Joseph B. Shumate, Jr., from the Coleman Furniture Corporation Pension Plan. First, John R. Patterson, Trustee in Bankruptcy for Joseph B. Shumate, Jr., claims that Shumate benefits should be paid to him and administered as part of

Shumate's bankruptcy estate. Second, Shumate claims that the amount of his benefits is greater than the amount determined by Roy V. Creasy, Trustee and Plan Administrator of the Pension Plan.

2. The Court finds that it is proper for a settlement of the issue regarding the amount of Shumate's benefits to be made which permits the payment of funds in escrow under the supervision of the Court, because this will permit Creasy to proceed with the termination of the Pension Plan without any further involvement with Shumate's benefits.

3. The Court has considered a settlement agreement dated of November 12, 1987, which has been submitted to the Court and finds that the terms of the settlement set forth in this Agreement are appropriate.

THEREFORE, it is ORDERED that Roy V.

Creasy, Trustee, as Plan Administrator of the Coleman Furniture Corporation Pension Plan, is authorized to direct the payment of $250,000.00, representing Shumate's entire interest in the Pension Plan, from the Pension Plan to be deposited with the Clerk's Registry Fund, which fund shall be maintained by the Clerk of this Court in the short-term (no longer than 35 days) Certificates of Deposit as follows:

$100,000.00 at Jefferson Savings & Loan Association, Roanoke, Virginia
$100,000.00 at Virginia First Savings Bank, Roanoke, Virginia
$50,000.00 at Southwest Virginia Savings & Loan Association, Roanoke, Virginia

Each Certificate of Deposit shall bear the Tax Identification Number of Joseph B. Shumate, Jr., (231-24-6423), and such sum is to be deposited with the Clerk of this Court in the Clerk's Registry Fund until such time as the rights between Shumate and Patterson to this fund are

resolved.

It is further ORDERED that the Court ratifies, approves, and incorporates into this order by reference the Agreement between Creasy, Shumate, Patterson and the Plan dated November 12, 1987, and all the terms of the Agreement are to be enforced as part of this order.

It is further ORDERED that Roy V. Creasy, Trustee in Bankruptcy for Coleman Furniture Corporation, is dismissed as a party defendant in the Adversary Proceeding in the United States Bankruptcy Court for the Western District of Virginia, styled In re: Joseph B. Shumate, Jr., Debtor and John R. Patterson, Trustee v. Roy V. Creasy, Trustee in Bankruptcy for Coleman Furniture Corporation and Joseph B. Shumate, Jr.; Case No. 7-84-00549; Adversary Proceeding No. 7-87-0133.

The Clerk of this Court is directed to send certified copies of this Order to the Clerk of the United States Bankruptcy Court for the Western District of Virginia, G. Steven Agee, Esq., James F. Douthat, Esq., Harry S. Rhodes, Esq., and Joseph B. Shumate, Jr.

And this case is continued.

ENTER this 3 day of December 1987.

/s/ Glen M. Williams
Judge

We request entry of this Order:

/s/ Harry S. Rhodes
Harry S. Rhodes, Esq.
Counsel for Roy V. Creasy, Trustee in Bankruptcy for Coleman Furniture Corp and Plan Administrator for the Coleman Furniture Pension Plan

/s/ Seen and not objected to:
/s/ G. Steven Agee
G. Steven Agee, Esq.
Counsel for John R. Patterson, Trustee

/s/ Seen and not objected to:
/s/ James F. Douthat
James F. Douthat, Esq.
Counsel for NCNB Financial Services

/s/ Joseph B. Shumate, Jr.
Joseph B. Shumate, Jr.

LETTER:

February 25, 1988

Mr. Jerome Murray
Pension Benefit Guaranty Corporation
2020 K Street, NW
Washington, D.C. 20006-1806

RE: Coleman Furniture Corp Pension Plan
EIN/PN: 54-0176030-001
Your Reference Number: 07764700

Dear Mr. Murray:

Pursuant to our telephone conversation of February 19, 1988, enclosed please find the final documentation you requested in order to close your case file for the Coleman Furniture Corporation Pension Plan termination. The information you requested is contained in four separate documents. These documents are as described below:

1. List of active and vested terminated participants, including the participants name, address, telephone

number, and amount of distribution. This listing also contains an item for withholding shown as W/H on our printout. Please disregard this additional information. We have provided the telephone numbers for those individuals whose numbers we had in our file or could easily obtain. Many of these individuals do not have telephones and therefore we have not provided telephone numbers for them.

2. This list is the list of those participants who are vested as a result of the partial termination October 30, 1981. We have provided as much information as we have on these individuals.

3. Retirees. This is the information on those individuals who had retired from Coleman and were receiving monthly benefits at the time of the termination.

4. Annuity Information. This is a list of the five individuals who elected to receive an annuity rather than a lump sum distribution. This annuity contract is with Nationwide Life Insurance Company.

Distribution for all of the above individuals were made on or about July 1, 1987.

The largest benefit was payable to Joseph B. Shumate, Jr., formerly president of Coleman Furniture Corporation. As a result of litigation concerning the amount and form of Mr. Shumate's benefits, the United States District Court for the Western District of Virginia entered an Order dated December 3, 1987 (a copy of which is enclosed) directing Roy V. Creasy, Trustee in Bankruptcy for Coleman Furniture Corporation and Plan Administrator of Coleman Furniture

Corporation Pension Plan, to pay the sum of $250,000.00 into the Court in fulfillment of its obligations to pay out these benefits. Mr. Shumate and his Bankruptcy Trustee are still in litigation to determine who is entitled to these benefits and in what form they will be paid.

I believe this covers all the information that you requested. Should you have any questions or need any additional information, please do not hesitate to let us know.

Very truly yours,

BERSCH & RHODES, P.C.

/s/ Alice G. Burlinson
Alice G. Burlinson

AGB:bmb
Enclosures
cc: Roy V. Creasy, Trustee